In my view, there is no necessity at all to set out evidence which properly should be adduced at the trial. Furthermore, there is absolutely no necessity whatever to repeat the allegations and to spell out detailed evidence to support those allegations. By so doing the plaintiff enjoys undue advantage of introducing evidence which it is for the trial court to determine in particular in regard to its relevancy and admissibility. It is particularly improper, in the instant case, as not only detailed evidence had been included but the plaintiff had even proceeded thereafter to secure various forms of publicity to gain an undue advantage such that it gives me the distinct impression that the plaintiff was not acting *bona fide* and conceivably is being vexatious and abusing the process of the court. The appearance of the particulars contained in the reply in the New Straits Times, I believe, would not have been possible without the aid of the plaintiff and evidently she had chosen to secure the publication in order to expose the allegations contained in the particulars publicly before trial. Short of being contempt of court her conduct was certainly reprehensible and she cannot be said to have acted *bona fide*.

The point at issue, however, is to determine which particulars should be allowed and which should be struck out. To my mind the plaintiff had only partially complied with the Rules of the Supreme Court. Fundamentally she had gone beyond what is required by the proviso of Order 19 rule 22 particularly in the light of rule 4 which provides that only the material facts must be pleaded but not evidence by which they are to be proved. To my mind, rule 19 would seem to apply the same principle. At this juncture it is not the intention of this court to got into the merits of the particulars with a view to determining their materiality, relevancy and admissibility. This should be done at the trial. Failure to comply with the rule will undoubtedly result in unnecessary delay and expense. In consideration it is my judgment that the particulars contained in the reply shall be struck out and the plaintiff is ordered to file fresh particulars and the onus is on her to ensure strict compliance with Order 19 rule 22.

Turning now to the 9th defendant's application that the claim founded upon conspiracy to defame be struck out I have indeed arrived at a finding that the claim "to conspire to defame" has indeed merged with claim for libel and if I may borrow the words of Denning L.J. in *Ward* v. *Lewis & Ors., supra* at page 11, that "when a tort has been commited ... an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort." The rest of the observations of Denning L.J. in that case seems to fall squarely upon the point at issue and for these reasons I would to the extent stated herein allow the 9th defendant's application by making an order that the allegations in paragraphs 9 and 10 of the Statement of Claim as to conspiracy to defame be struck out with a further order that the plaintiff is to make the necessary amendments. The defendants represented by counsel before the court are awarded costs of these applications.

Order accordingly.

Solicitors: *Mah-Kok & Din; Eugene Lye & Co.; Ng Ek Teong & Partners.*

PUBLIC PROSECUTOR v. LIM JOO SOON

[R.Cr.J. (Harun J.) March 17, 1978]

[Kuala Lumpur — Criminal Revision No. 2 of 1978]

Customs and Excise — Goods dutiable, uncustomed or prohibited — Burden of proof — Courts of Judicature Act, 1964, s. 35 — Customs Act, 1967, ss. 3(3), 17, 22, 121, 135 (1)(d) & (2), 143.

In this case the defendant was charged with refusing to meet the demand for payment of duty in respect of cast iron gate valves. The issue was whether the cast iron gate valves were dutiable. The prosecution relied on a notification by the Director-General to the Senior Superintendent of Customs that the article was dutiable.

Held: the notification in this case was not a certificate and even if it was it was not conclusive evidence that the goods were dutiable nor did it raise a presumption that the goods were dutiable;

(2) in customs cases, the burden of proof that the goods are dutiable, uncustomed or prohibited is on the prosecution. In appropriate cases, the prosecution may rely on the presumption that the goods shall be deemed to be dutiable, uncustomed or prohibited to the knowledge of the defendant. In all cases the defendant is at liberty to prove either during the case for the prosecution or in the course of the defence that the goods are not dutiable, uncustomed or prohibited as the case may be.

Cases referred to:-

(1) *Tan Seng Tin* v. *Public Prosecutor* [1970] 1 M.L.J. 100.

(2) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 W.L.R. 163.

(3) *Saminathan & Ors.* v. *Public Prosecutor* [1955] M.L.J. 121 at 124.

(4) *Public Prosecutor* v. *Ng Fah* [1954] M.L.J. 150.

CRIMINAL REVISION.

Raja Abdul Aziz Addruse for the applicant.

Shaari Mohamed Noor for the respondent (Public Prosecutor).

Harun J.: This is an application by the defence under section 35 of the Courts of Judicature Act, 1964.

The facts at the close of the case for the prosecution are as follows:

The defendant represents a company which is an importer of Cast Iron Gate Valves. Between November 1973 and June 1975 the defendant imported quantities of Cast Iron Gate Valves through Johor Bahru and did not pay duty on them. Between December 1973 and March 1974 the defendant also imported the same type of valves through Port Kelang but paid duty on them.

According to the Customs Duties Order, 1968, issued under section 11 of the Customs Act, 1967, iron valves are generally not dutiable except:

"manually operated sluice valves with inlet or outlet of an internal diameter exceeding 2" but not exceeding 16"."

Dutiable iron valves are classified under Tariff Code 84.61. 110; and non-dutiable iron valves are classified under Tariff Code 84.61. 190.

In November 1974, the Customs discovered the discrepancy between Port Kelang and Johor Bahru. It appeared that the type of iron valves imported by the defendant was also being imported by three other companies through Johor Bahru and in all cases the goods were classified under Tariff Code 84.61. 190 so

that no duty was paid. In Port Kelang however, the same type of goods were classified under Tariff Code 84.61. 110 and duty paid.

On November 5, 1974 a party of customs officers seized the iron valves imported by the defendant through Johor Bahru. The defendants protested and by letter asked for the return of their goods. It was the contention of the defendants through their solicitors that the goods were not dutiable. Subsequently the solicitors also claimed that the goods seized be returned under section 128 of the Customs Act as there had been no prosecution within one month of seizure.

On November 25, 1974, the customs officer who seized the goods wrote to his superiors for a ruling regarding the classification of the goods. On May 14, 1975 he received a reply (Exhibit P5) to the effect that Cast Iron Gate Valves are classified under Tariff Code 84.61. 110, that is to say that it is dutiable. On November 13, 1975 which was more than a year after the goods were seized, the customs wrote to the defendant (Exhibit P7) demanding payment of $172,748.45 as duty within two weeks presumably under section 17 of the Customs Act 1967.

I pause here to make certain observations regarding Exhibit P7. It refers to seizure made on October 15, 1974 whereas the evidence clearly discloses that the seizures actually took place on November 5, 6 and 7, 1974. It also refers to Seizure Notice dated November 5, 1974 whereas that notice (Exhibit P4) is dated November 8, 1974. Section 17 of the Customs Act, 1967 was amended by Act A313 which came into force on August 15, 1975. By this amendment, the period within which a demand under section 17 may be made was increased from twelve months to three years from the date on which customs duty was payable. The question arises whether such a demand can be made after more than twelve months in respect of goods imported before the amendment came into force. I make no ruling at this stage as the point was not argued. Finally the letter states that the decision to classify the goods as dutiable was made by the Director-General of Customs under section 22 of the Customs Act.

On December 15, 1975, the defendant appealed to the Minister under section 143 of the Customs Act. To date there has been no decision from the Minister although several reminders have been sent to him. At the trial, however, it was contended by the prosecution that there is no appeal to the Minister against a decision made by the Director-General under section 22. This contention could perhaps account for the silence of the Minister. The contention is wrong. Section 143 only prohibits appeals to the Minister arising from decisions of the Director-General which are specially provided to be "at the absolute discretion of the Director-General". All other decisions are subject to appeal to the Minister. There is no specific provision under section 22 that any decision made thereunder is at the absolute discretion of the Director-General. Such a decision is therefore appealable under section 143.

On April 8, 1977 the customs officer applied for a summons to prosecute the defendant for possession of uncustomed goods on November 5, 1974 under section 135(1)(d) of the Customs Act as the defendant refused to meet the demand for payment of duty under section 17 of the Customs Act.

The real issue in this case is whether or not Cast Iron Gate Valves are dutiable under Tariff Code 84.61. 110. The prosecution says it is and relies on the letter of May 14, 1975 (Exhibit P5) which they say is a certificate under section 22 of the Customs Act. A translation of that letter reads as follows:

"Senior Superintendent of Customs,
Preventive,
Royal Customs & Excise,
Port Kelang.

Cast Iron Gate Valves

(with inlet or outlet of internal diameter exceeding 2" but not exceeding 16")

It is hereby notified that the article referred to above is classified under Code 84.61. 110.

Sgd.
(ADNAN BIN MD. ISA)
Tariff Division
on behalf of Director-General
Royal Customs & Excise
Malaysia"

At the commencement of the trial on March 1, 1978 counsel for the defence applied to the court for permission to allow their expert witness to be present in court to assist the defence. The prosecution objected and said that the court could not go behind the certificate and relied on *Tan Seng Tin* v. *Public Prosecutor*[1] as authority for that proposition. The learned President agreed and recorded his ruling as follows:

"The question as to whether the goods in question are dutiable or not does not arise. Section 22 of the Customs Act is abundantly clear i.e. that the decision of the Comptroller-General and the certificate issued by him are conclusive."

He disallowed the application and the trial proceeded. When Encik Adnan, a Senior Superintendent of Customs and the writer of Exhibit P5 gave evidence, counsel attempted to cross-examine him on how the Director-General came to his decision under section 22 of the Customs Act. The prosecution objected again as this meant that the court was going behind the certificate. Counsel submitted that the court had jurisdiction and relied on *Anisminic Ltd.* v. *Foreign Compensation Commission.*[2] The learned President upheld the object by the prosecution. The prosecution closed its case and the learned President called the defence. The trial is to be resumed on April 3, 1978. In the meantime there is this application by the defence for this court to intervene to give to the Sessions Court "such directions as to the further conduct of the case as justice may require."

The dilemma of the defence is understandable. The court has ruled that the goods are dutiable. The only defence they have is to show that the goods are not dutiable but the court is preventing them from doing so.

"The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts, to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if

he raises a doubt in the prosecution case and this he may do by 'disproving' a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists": Buhagiar J. in *Saminathan & Ors.* v. *Public Prosecutor.*[3] In prosecutions under the Customs Act, however, that task is rendered easier by the operation of "reversal of onus" provisions like section 119 of the Act but nevertheless, although it may invoke to the full the assistance of any such provisions that may be applicable the prosecution must prove its case to the satisfaction of the court and the court must not convict an accused person unless it is satisfied that he is guilty. Section 119 of the Act has the effect of shifting the onus of proof regarding certain facts from the prosecution on which it would otherwise lie to the accused. In addition section 135(2) of the Customs Act reads:

"In any prosecution under this section (135(1)) or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant *unless the contrary be proved by such defendant.*"

The general principle therefore is for the prosecution to prove that the goods are dutiable. This the prosecution may do by showing what is obvious to the court e.g. that watches are dutiable by referring to the appropriate Tariff Code Number but it does not have to produce evidence that the article in question is a watch as it would be obvious to the court. Some articles however are not so obvious e.g. chemical substances, minerals and the alcoholic content of liquors. Thus in *Public Prosecutor* v. *Ng Fah*[4] the Court of Appeal upheld the decision of the Magistrate to acquit on the grounds that there was no evidence to prove that the substance the subject matter of the charge was tin ore. Section 121 of the Act assists the prosecution to prove such technical matters by the production of a certificate by an analyst. Generally, analysts' certificates are not challenged but there is provision for the defendant to require that the analyst be called as a witness. What then of the presumption under section 135(2) of the Act. This is merely to assist the prosecution in that they do not have to prove that the goods in question are dutiable, uncustomed or prohibited in every case but if the prosecution relies on this presumption it runs the risk that the defence may rebut it and it will then be too late to prove otherwise because by then the defence would have succeeded in disproving the case for the prosecution.

Returning now to our present case. Here the only 'evidence' that the goods are dutiable is the letter P5 and described as a certificate issued by the Director-General of Customs under section 22 of the Act. That section reads:

"If any question arises as to whether any particular goods are or are not included in a class of goods appearing in an order made under sub-section (1) of section 11, such question shall be decided by the Director-General."

The powers under the section may only be exercised by the Director-General: section 3(3) of the Act. Now Encik Adnan who signed P5 is not the Director-General but a Senior Superintendent of Customs. In his evidence he said that it was he who made the ruling. He has not said how he came to that decision and the defence was not permitted to cross-examine him on the point. In fact not one of the seven prosecution witnesses could say whether Cast Iron Gate Valves are Manually Operated Sluice Valves or even whether there is a difference between the two types of valves.

I am of the view that if the letter P5 is intended to be a certificate under section 22 of the Act, then it must be stated clearly that it is such a certificate and signed by the Director-General himself. As it stands it is only an internal departmental letter from the Tariff Division of the Department to its revenue collectors at Port Kelang.

Be that as it may, what is the effect of a certificate issued under section 22 of the Act in a criminal prosecution under the Act. It seems to me that the purpose of that section is merely to stop arguments concerning classification for purposes of revenue collection at the level of the Director-General subject to a final appeal to the Minister. There is no provision in that section that the decision of the Director-General is to be accepted as conclusive or even presumed by any court in the manner required by the Act under sections 21, 35, 44, 46 and 121. The only reference to certificates issued under section 22 is to be found in section 115A but we are not concerned with the provisions of that section here. It would appear therefore that although a certificate properly issued under section 22 of the Act may be relevant at a trial it is not conclusive evidence that the goods are dutiable nor does it raise a presumption of law that the goods are dutiable. I hold that the 'certificate' P5 is not proof of the fact that the goods are dutiable.

Having come to that decision I must now revert to *Tan Seng Tin* v. *Public Prosecutor, supra,* wherein the learned judge said: "He (the learned President) is also wrong in law in my view in saying that he could go behind the certificate even if P6 can be regarded as having been made pursuant to section 22 of the Customs Act 1967". That statement is *obiter* as the decision in that case was on the facts without the aid of the certificate and is not authority for the proposition on which the learned President made his ruling in this case.

The position then is this. In Customs cases, the burden of proof that the goods are dutiable, uncustomed or prohibited is on the prosecution. In appropriate cases, the prosecution may rely on the presumption that the goods shall be deemed to be dutiable, uncustomed or prohibited to the knowledge of the defendant. In all cases the defendant is at liberty to prove either during the case for the prosecution or in the course of the defence that the goods are NOT dutiable, uncustomed or prohibited as the case may be.

It follows as far this case is concerned that the prosecution has not produced any evidence to prove that Cast Iron Gate Valves, the subject matter of the charge, are either dutiable or uncustomed goods. The prosecution, nonetheless, has proved its case because it can rely on the presumption under section 135(2) of the Act that the goods are deemed to be dutiable or uncustomed.

I would therefore remit this case back to the Sessions Court for the trial to be continued with the following directions:

1. As the goods were cleared through the Customs the issue is whether the goods were "uncustomed" because duty has not been paid.

2. To consider whether a prosecution for possession of uncustomed goods under section 135(1)(d) of the Act will lie in respect of goods on which the demand for payment of duty under section 17 of the Act was made after the period limited for such demand has lapsed.

3. In the event that a prosecution is still valid an opportunity be given to the prosecution to re-open their case to prove that the goods are dutiable if they so desire as there has been a misunderstanding of the effect and use of a certificate under section 22 of the Act on the part of all concerned; and further that the nature of the goods are such that it is not obvious to the court or layman.

4. In the event that the prosecution re-open their case the expect witness to be called by the defence be permitted to attend court when the prosecution expert witness is giving evidence if the defence so desires; and the defence be at liberty to cross-examine the witnesses called by the prosecution.

5. In the event that the defence is called, the defence be at liberty to prove that the goods the subject-matter of the charge are not dutiable.

Order accordingly.

Solicitors: *Rithauddin & Aziz.*